A **FIVE STAR HERITAGE SDN BHD & ORS v. PEGUAM NEGARA MALAYSIA & ORS**

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: P-01(A)-5-01-2017]
10 AUGUST 2018

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Application for leave for judicial review against decision of Attorney General dismissed by High Court – Attorney General gave consent for parties to proceed with trust matter concerning land – Whether consent of Attorney General susceptible to judicial review – Whether application for judicial review frivolous and vexatious – Whether justified further argument on substantive stage – Whether issues raised required*
D *serious discussion and examination at proper trial – Whether application for leave for judicial review ought to be allowed*

TRUSTS: *Land – Public trust property – Dispute over land that formed public trust – Whether land could be sold – Whether consent of Attorney General required – Whether decision of Attorney General to give consent to parties to proceed with suit*
E *susceptible to judicial review – Government Proceedings Act 1956, s. 9*

The present appeal stemmed from a dispute over a piece of land ('Lot 2103') which was originally part of a land known as Lot 104. Lot 104, with a temple erected on it, was originally given on trust to Burmese and Thai trustees, with
F no power to, *inter alia*, sell, transfer or, otherwise, alienate the land and it was to remain and continue for the benefit of their communities. The said trust was created by the East India Company in 1845. However, in 1994, the trustees entered into an agreement, endorsed by the court, to partition Lot 104 into two lots, namely, (i) Lot 2102 which was to be taken by the trustee of the Thai community; and (ii) Lot 2103 to be taken by the trustee of the
G Burmese community. Lot 2103 was further divided into Lot 10029 and Lot 10030. The first appellant was the registered owner of Lot 10029 while the second to fifth appellants were the trustees of the Penang Burmese Trust Property for the Burmese community in Penang and the sixth appellant was the Vice Chairman of the Penang Burmese Society. The second respondent
H claimed to be the owner of the property on Lot 10029. The first appellant filed an action which was pending at the High Court ('the civil suit'). In their defence and counterclaim, the respondents averred that vacant possession of the said premise need not be delivered on the ground, *inter alia*, that the land involved a public trust under s. 9 of the Government Proceedings Act 1956
I ('GPA') and, therefore, could not be sold and transferred without the consent of the first respondent, the Attorney General ('AG'), and the transfer and

sub-division of Lot 2103 was questionable. The second respondent filed an action, seeking to, *inter alia*, set aside the registration of the appellants as the owner of Lot 10029 and Lot 10030 and a permanent injunction to restrain the appellants from acting as the registered owners of the two lots which the respondents alleged was a public trust property ('the originating summons'). After filing the originating summons, the second respondent wrote to the first respondent for his consent to proceed with the action and the latter gave his consent. The appellant filed an *ex parte* application at the High Court for leave to make an application for judicial review against the consent given by the first respondent. The High Court dismissed the application on the ground that the same was frivolous, vexatious and did not justify further argument on a substantive stage. Hence, the present appeal.

Held (dismissing appeal)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The consent of the AG, being a decision of a public authority, was susceptible to judicial review. The consent, under s. 9 of the GPA, was not merely an administrative decision. The purpose of judicial review is to, *inter alia*, ensure that public authority, which exercises powers given by the law, is kept within the confine of the powers conferred upon him. Article 145(3) of the Federal Constitution provides that the AG shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial. Hence, the AG has unfettered discretion in relation to prosecution of criminal offences based on the Federal Constitution. However, in respect of civil cases, he has no such unfettered discretion. To assert that the AG's consent, under s. 9 of the GPA, was non-justiciable was a little extreme as, like any other public authority, the discretion given to him in civil matters could be free from legal restraint as there is no absolute discretion in public law. In a non-criminal matter, like in this appeal, the court could exercise its judicial review to ensure the power or discretion given by the law is not abused. (paras 13-15)

(2) It is the function of the court, in exercising its power to grant leave for judicial review, to sieve through the application before it and determine that the application is not frivolous and vexatious and that there is an arguable case to merit further argument on the substantive motion. The court must always bear in mind the following principles in respect of such an application: (i) if it is clear to the judge that there is a point for further investigation on a full *inter partes* basis with all evidence as was reasonably necessary on the facts, and all such arguments on the law, then leave ought to be granted; (ii) if the judge hearing the leave

application is satisfied that there is no arguable case, the judge should dismiss the application for leave to move for leave for judicial review; (iii) if the judge is not really sure whether there is, or there is not, an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and (iv) in exercising the powers in an *inter partes* leave application, the test applicable by the court must be the same approach as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and the law before it and ask itself whether the court is satisfied there is a case fit for further consideration or otherwise. (para 17)

(3) The issues of whether the Burmese Trust was a public charitable trust, or a private trust, and who was entitled to Lot 10029 and the said premises were to be decided in the civil suit and the originating summons. The appellants, in their judicial review application, sought, *inter alia*, for a declaration that the Penang Burmese Trust created under the trust deed was a valid private trust. It was premature to seek such a relief as the issues could not be resolved simply by way of judicial review. The issues raised required serious discussion and examination at a proper trial. Witnesses needed to be called and each party to be given opportunity to ventilate the issues and for the court to evaluate. It could not, definitely, be exercised by mere examination of the documents. In this appeal, the application for leave was clearly frivolous and vexatious as there were already two pending suits dealing with the same issues which, until now, have not been disposed of. (paras 16 & 18)

Bahasa Malaysia *Headnotes*

Rayuan ini timbul susulan pertikaian tentang sebidang tanah ('Lot 2103') yang asalnya sebahagian tanah yang dikenali sebagai Lot 104. Lot 104, yang atasnya terbina sebuah kuil, asalnya diberi sebagai amanah kepada pemegang-pemegang amanah dari Myanmar dan Thailand, tanpa kuasa, antara lain, menjual, memindah milik atau, sebaliknya, memberi milik tanah tersebut dan ini kekal dan berterusan untuk manfaat komuniti mereka. Amanah tersebut dibentuk oleh Syarikat India Timur pada 1845. Walau bagaimanapun, pada 1994, pemegang-pemegang amanah ini memeterai satu perjanjian, yang diendors oleh mahkamah, untuk memecah Lot 104 menjadi dua iaitu (i) Lot 2102 yang akan diambil oleh pemegang amanah komuniti Thai; dan (ii) Lot 2103 yang akan diambil oleh pemegang amanah komuniti Burma. Lot 2103 seterusnya dibahagikan menjadi Lot 10029 dan Lot 10030. Perayu pertama ialah pemilik berdaftar Lot 10029 manakala perayu kedua hingga kelima ialah pemegang amanah Penang Burmese Trust Property untuk komuniti Myanmar di Pulau Pinang dan perayu keenam ialah Timbalan

Pengerusi Penang Burmese Society. Responden kedua mendakwa dia pemilik hartanah Lot 10029. Perayu pertama memfailkan satu tindakan yang masih berjalan di Mahkamah Tinggi ('guaman sivil'). Dalam pembelaan dan tuntutan balas mereka, responden-responden menegaskan milikan kosong tanah tersebut tidak perlu diserahkan atas alasan, antara lain, tanah tersebut melibatkan amanah awam bawah s. 9 Akta Prosiding Kerajaan 1956 ('APK') dan, oleh itu, tidak boleh dijual dan dipindah milik tanpa kebenaran responden pertama, iaitu Peguam Negara ('AG') dan pindah milik dan pecah bahagian Lot 2103 boleh dipersoalkan. Responden kedua memfailkan satu tindakan untuk, antara lain, mengetepikan pendaftaran perayu-perayu sebagai pemilik Lot 10029 dan Lot 10030 dan injunksi kekal menghalang perayu-perayu bertindak sebagai pemilik berdaftar kedua-dua lot tersebut yang responden-responden dakwa adalah hartanah amanah awam ('saman pemula'). Selepas memfailkan saman pemula, responden kedua menulis kepada responden pertama untuk mendapatkan kebenaran beliau untuk meneruskan dengan tindakan dan beliau memberi kebenaran tersebut. Perayu memfailkan permohonan *ex parte* di Mahkamah Tinggi untuk kebenaran membuat permohonan semakan kehakiman terhadap kebenaran yang diberi oleh responden pertama. Mahkamah Tinggi menolak permohonan atas alasan permohonan remeh dan menyusahkan dan tidak mewajarkan hujahan lanjut di peringkat substantif. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Kebenaran AG, iaitu keputusan pihak berkuasa awam, boleh dikenakan semakan kehakiman. Kebenaran tersebut, bawah s. 9 APK, bukan sekadar keputusan pentadbiran. Tujuan semakan kehakiman ialah, antara lain, memastikan pihak berkuasa awam, yang menjalankan kuasa yang diberi oleh udang-undang, terbatas menurut batasan kuasa yang diberi kepadanya. Perkara 145(3) Perlembagaan Persekutuan memperuntukkan AG mempunyai kuasa, yang boleh dijalankan menurut budi bicara beliau, untuk memulakan, menjalankan atau tidak meneruskan apa-apa prosiding satu kesalahan, selain prosiding di Mahkamah Syariah, mahkamah anak negeri atau mahkamah tentera. Oleh itu, AG mempunyai bidang kuasa tanpa batasan dalam pendakwaan kesalahan-kesalahan jenayah menurut Perlembagaan Persekutuan. Walau bagaimanapun, dalam kes sivil, beliau tidak mempunyai bidang kuasa tanpa batasan. Tegasan bahawa kebenaran AG, bawah s. 9 APK, tidak boleh diadili agak keterlaluan kerana, seperti mana-mana pihak berkuasa awam yang lain, bidang kuasa yang diberi kepada beliau dalam hal perkara sivil mungkin bebas kekangan undang-undang kerana tiada bidang kuasa mutlak dalam undang-undang awam. Dalam hal perkara bukan jenayah, seperti rayuan ini, mahkamah boleh menjalankan semakan kehakiman untuk memastikan kuasa atau bidang kuasa yang diberi oleh undang-undang tidak disalah guna.

(2) Mahkamah berfungsi, dalam menjalankan kuasanya memberi kebenaran untuk semakan kehakiman, menapis permohonan yang dikemukakan padanya dan memutuskan permohonan tersebut tidak remeh dan menyusahkan dan terdapat kes yang boleh dipertikaikan dalam usul substantif. Mahkamah mestilah sentiasa beringat akan prinsip-prinsip berikut dalam permohonan sedemikian; (i) jika jelas pada hakim tersebut bahawa terdapat sebab untuk siasatan lanjut atas dasar *inter partes* penuh dengan semua keterangan seperti yang, munasabahnya, perlu berlandaskan fakta dan semua hujahan bawah undang-undang, maka kebenaran harus diberi; (ii) jika mahkamah yang mendengar permohonan kebenaran berpuas hati tiada kes yang dipertikaikan, mahkamah mestilah menolak permohonan kebenaran untuk memperoleh kebenaran semakan kehakiman; (iii) jika hakim tidak pasti sama ada terdapat, atau tidak, kes yang dipertikaikan, hakim boleh mempelawa responden, yang diandaikan, hadir dan berhujah sama ada kebenaran wajar diberi atau tidak; dan (iv) dalam menjalankan kuasa-kuasa dalam permohonan kebenaran *inter partes*, ujian yang terpakai oleh mahkamah mestilah pendekatan serupa seperti ujian yang diguna pakai dalam memutuskan sama ada kebenaran merayu terhadap award penimbang tara wajar diberi. Mahkamah harus mempertimbangkan fakta dan undang-undang yang dikemukakan dan bertanya sama ada mahkamah berpuas hati terdapat kes sesuai untuk pertimbangan lanjut atau sebaliknya.

(3) Isu-isu sama ada Burmese Trust ialah amanah kebajikan awam, atau amanah persendirian, dan siapa yang berhak mendapat Lot 10029 dan premis tersebut akan diputuskan dalam guaman sivil dan saman pemula. Perayu-perayu, dalam permohonan semakan kehakiman, memohon, antara lain, perisytiharan Penang Burmese Trust yang dibuat bawah surat ikatan amanah adalah amanah persendirian yang sah. Tindakan memohon relief sedemikian adalah pra-matang kerana isu-isu ini tidak boleh diselesaikan melalui semakan kehakiman sahaja. Isu-isu ini memerlukan perbincangan dan pemeriksaan serius dalam perbicaraan sebenar. Saksi-saksi perlu dipanggil dan pihak-pihak harus diberi peluang menyuarakan isu-isu tersebut dan agar mahkamah boleh menilai. Ini tentu tidak dapat dijalankan melalui pemeriksaan dokumen-dokumen sahaja. Dalam rayuan ini, permohonan kebenaran jelas remeh dan menyusahkan kerana terdapat dua guaman yang sedang berjalan yang berhadapan dengan isu-isu sama yang, hingga kini, masih belum dilupuskan.

Case(s) referred to:

Ahli-ahli Suruhanjaya yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video yang Mengandungi Imej Seorang yang dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Gouriet v. Union of Post Office Workers and Others [1977] QB 729 ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Merdeka University Bhd v. Government of Malaysia [1982] 1 LNS 1 FC ***(refd)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R v. Secretary of State for Home Department, ex parte Rushkanda Begum [1990] Crown Office Digest 109 ***(refd)***

Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(refd)***

Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo [2014] 9 CLJ 577 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 145(3)
Government Proceedings Act 1956, s. 9
Rules of Court 2012, O. 53 r. 3(1)

For the appellants - Karin Lim Ai Ching & A Suppiah; M/s Juli & Ameleena
For the 1st respondent - Shamsul Bolhassan & Rosli Ahmad; SFCs
For the 2nd & 3rd respondents - T Gunaseelan, Balwant Singh & Ravin Veloo; M/s Balwant Singh & Co

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof JCA:

[1] The appellants in this appeal are appealing against the decision of the High Court at Penang which had on 22 November 2016 dismissed their *ex parte* application for leave to make an application for judicial review under O. 53 r. 3(1) of the Rules of Court 2012.

[2] The application for leave for judicial review was basically against the consent given by the first respondent, the Attorney General, to the second and third respondents under s. 9 of the Government Proceedings Act 1956 (GPA) to proceed with proceedings commenced by the second respondent under the Originating Summons: No 24 NCVC-1128-12-2014 (OS 1128) in which the third respondent after successfully intervened, had been added as the second plaintiff.

A **Background Facts**

[3] The dispute herein revolves around a piece of land formerly known as Lot No. 2103, Section 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran Pendaftaran No. 61390 (lot no. 2103). The said Lot 2103 was originally part of a land known as Lot No. 104, Section 4, B Georgetown, North East District Penang held under Geran (1st Grade) No. 6719 (Lot 104). Lot 104 with a temple erected thereon was originally given on trust to Burmese and Thai trustees for them to manage the temple for their community, with no power to *inter alia*, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such community. C The said trust was created by the East India Company on behalf of Queen Victoria on 30 May 1845.

[4] However, on 16 April 1994, the trustees had entered into an agreement which was later endorsed by the court *vide* a court order dated 19 October 1994, to partition the trust property ie, Lot 104 into two lots that D is Lot 2102 to be taken by the trustee of the Thai Community and Lot 2103 to be taken by the trustee of the Burmese Community.

[5] The said Lot 2103 had further been divided into two and now known as lot no. 10029 and lot no. 10030 respectively. The first appellant is currently the registered owner of lot no. 10029. The second to fifth E appellants are the trustees of the Penang Burmese Trust Property for the Burmese Community in Penang and the sixth appellant is the vice-chairman of the Penang Burmese Society.

[6] The second respondent claims to be the owner of the premise known F as No. 3, Burmah Lane, 10350 Penang which is now under Lot 10029. The first appellant had filed an action which is now pending at the Penang High Court registered as Civil Suit No: PA-22NCVC-34-02/2016. In their defence and counterclaim, the first respondent averred that he need not deliver vacant possession of the said premise on the ground, *inter alia*, that the land involves a public trust under s. 9 of the GPA and therefore cannot be sold and G transferred without the consent of the Attorney General and therefore the transfer and sub-division of Lot 2103 is questionable.

[7] Subsequent thereto, the second respondent filed OS 1128. In OS 1128 the second respondent seeks to, *inter alia*, set aside the registration of the H appellants as the owner of Lots 10029 and 10030 and permanent injunction to restrain the appellants from acting as the registered owners of the two lots which the second respondent alleges is a public trust property. After filing the OS 1128, on 20 August 2015, the second respondent wrote to the first respondent for his consent to proceed with OS 1128. On 31 May 2016, the first respondent gave his consent which is now being opposed by the I appellants herein.

High Court Decision

[8] The appellants' application for leave to proceed with the judicial review was dismissed by the learned High Court Judge as Her Ladyship agreed with the preliminary objection raised by the Senior Federal Counsel that the application should be dismissed as it was frivolous, vexatious and did not justify further argument on a substantive stage. The followings are the reasons given by Her Ladyship:

> The applicants' main complaint is consent was given to the 2nd and 3rd respondents. It is submitted that the 1st respondent's decision to give consent is a non-justiciable issue. He then cited the case of *Gouriet v. Union of Post Office Workers and Others* [1977] QB 729, wherein at page 730, the Court of Appeal held:
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> > (1) (per Lawton and Ormrod L.JJ.) "That the Attorney General's exercise of his discretion to refuse his consent to the bringing of relator proceedings in his name could not be reviewed or questioned by the courts.
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> Further down, at page 758, Lord Denning M.R, states:
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> > It has been submitted that the discretion of the Attorney General is an absolute discretion which will not be inquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the court will not review it. That was made clear by the Earl of Halsbury L.C. in his oft-quoted *dictum* in *London Country Council v. Attorney General in the House of Lords* [1902] A.C. 165, 168-169.
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> Based on the above authority, it is submitted that the first respondent's consent cannot be reviewed nor inquired by the court. I agree with SFC's submission. The right to give or refuse consent is within the absolute discretion of the Attorney General. In this case, the Attorney General had exercised his discretion to give the consent. The case law shows the applicants cannot challenge the consent on whatever grounds. Therefore, there are no merits in the grounds relied upon by the applicants. The issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided by the courts in Suits 22 NCVC-34-02-2016 and Originating Summons No: 24 NCVC-1128-12-2014. These issues cannot be resolved by way of judicial review. It is premature at this stage for the applicants to ask the court to declare the Burmese Trust is a private trust. Each party should be given opportunity to prove its case. For the aforesaid reasons, I find the applicants' application is frivolous and vexatious. Accordingly, I dismiss the application with no order as to costs.

Our Decision

[9] Before us, learned counsel for the appellants had argued that the first respondent's reliance on the case of *Gouriet v. Union of Post Office Workers and Others* [1977] QB 729, in making his preliminary objection that the discretion of the Attorney General is an absolute discretion and therefore cannot be inquired into by the courts; and Her Ladyship's acceptance of the argument, was wrong. Unlike *Gouriets*, *supra*, the appellants' application, did not relate to enforcement of criminal law by means of civil proceeding; but related to O. 53 of the Rules of Court 2012 and s. 9 of the GPA.

[10] In her written submissions, learned counsel for the appellants had cited the case of *Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294; [1988] 3 MLJ 149 and the case of *Merdeka University Bhd v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243 to show that the Attorney General is a public officer and also a public authority within O. 53 of the Rules of Court 2012; and that the appellants had been adversely affected by the decision of the Attorney General to give consent and as such the appellants had *locus standi* to challenge the decision of the Attorney General.

[11] It was also argued on behalf of the appellants that the learned High Court Judge was wrong to hold that the judicial review application was wrong as the only way to challenge the consent was by way of judicial review otherwise they will be precluded or estopped for raising the same objection when OS 1128 is heard.

[12] We had considered submissions made by the parties including the respondents' which submissions were similar with the decision of the learned High Court Judge.

[13] We must admit that learned counsel for the appellants had a point when she contended that the consent of the Attorney General, being a decision of a public authority is susceptible to judicial review. The consent under the said s. 9 in our view is not merely an administrative decision as submitted by learned counsel for the second and third respondents as it goes to the party's *locus* to bring an action.

[14] The purpose of judicial review is *inter alia* to ensure that public authority which exercises powers given by the law is kept within the confine of the powers conferred upon him. Its importance was clearly explained by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135:

> Unfettered discretion is a contradiction in terms. … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene …

[15] Article 145 cl. (3) of the Federal Constitution provides that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial. Hence we agree that the Attorney General has unfettered discretion in relation to prosecution of criminal offences based on the Federal Constitution. However, in respect of civil cases, we opine that he has no such unfettered discretion. In our view, to assert that the Attorney General's consent under s. 9 of the GPA is non-justiciable is a little extreme as like any other public authority, the discretion given to him in civil matter cannot be free from legal restraint as there is no absolute discretion in public law. See: *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169. A matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577; [2014] 6 MLJ 812. Hence, in a non-criminal matter like in this appeal, the court can exercise its judicial authority to ensure the power or discretion given by the law is not abused.

[16] However, looking back at the decision of the learned High Court Judge, we fully agreed with the learned High Court Judge that the issues of whether the Burmese Trust is a public charitable trust or a private trust and who is entitled to Lot 10029 and the said premises are to be decided in Suit 22 NCVC-34-02-2016 and OS 1128. The appellants in their judicial review application had sought *inter alia* for a declaration that the Penang Burmese Trust created under the trust deed dated 31 July 2006 is a valid private trust. We agreed with the learned High Court Judge that it is premature to seek such a relief as the issue cannot be resolved simply by way of judicial review. The issues raised require serious discussion and examination at a proper trial. Witnesses need to be called and each party to be given opportunity to ventilate the issue and for the court to evaluate. It cannot definitely be exercised by mere examination of the documents.

[17] It is trite, that it is the function of the court in exercising its power to grant leave for judicial review to sieve through the application before it and determine that the application is not frivolous and vexatious and that there is an arguable case to merit further argument on the substantive motion. See: *Ahli-ahli Suruhanjaya yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video yang Mengandungi Imej Seorang yang dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805. The court must always bear in mind the following principles in respect of such an application:

A (i) if it is clear to the judge that there is a point for further investigation on a full *inter partes* basis with all evidence as is reasonably necessary on the facts and all such arguments on the law, then leave ought to be granted;

(ii) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move
B for leave for judicial review; and

(iii) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

C (iv) in exercising the powers in an *inter partes* leave application, the test applicable by the court must be the same approach as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further
D consideration or otherwise.

See: *R v. Secretary of State for Home Department, ex parte Rushkanda Begum* [1990] Crown Office Digest 109.

[18] In the instant appeal, we found that the application for leave was clearly frivolous and vexatious as there already existed two pending suits
E dealing with the same issues which until now have not been disposed of.

[19] Based on the above, we agreed with the learned High Court Judge that the application did not justify further argument on a substantive motion. We therefore dismissed this appeal with no order as to cost.

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